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July 17, 2000

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VIA MESSENGERMs. Magalie R. Salas
Secretary
Federal Communications Commission
The Portals II
445 Twelfth Street, S.W.
Room TW-A325
Washington, D.C. 20554RECEIVED
JUL 17 2000
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARYRe: Amendment to Petition for Rule Making in the Matter of
Amendment of Section 73.622(b), DTV Table of
Allotments, TV Broadcast Stations (Boynton Beach,
Florida)

Dear Ms. Salas:

We represent Pappas Telecasting of America, a California Limited Partnership ("Pappas"). On behalf of Pappas, we respectfully submit herewith for filing with the Commission, one original and four copies of the above-referenced Amendment to Petition for Rule Making.

Please stamp the enclosed copy of this letter marked "File Copy" to indicate receipt of this filing by the Commission and return the stamped copy to our

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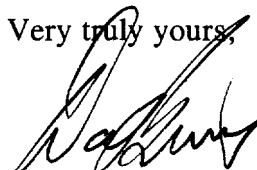
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PAUL, HASTINGS, JANOFSKY & WALKER LLP

Ms. Magalie R. Salas
July 17, 2000
Page 2

messenger. In the event that the Commission or its staff should have any questions concerning this matter, kindly refer them to the undersigned legal counsel for Pappas.

Very truly yours,



David D. Burns
for PAUL, HASTINGS, JANOFSKY & WALKER LLP

Enclosures

cc: Boynton Beach Public Library, 208 South Sea Coast Blvd., Boynton Beach, Florida, 33435, with enclosures, for placement in the local public inspection file for station.

Roy J. Stewart (with enclosures)

Keith Larson (with enclosures)

Guenter Marksteiner (with enclosures)

Harry J. Pappas (with enclosures)

Andrew S. Kersting, Esq. (with enclosures)

John Griffith Johnson, Jr., Esq. (with enclosures)

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of

Amendment of Section 73.622(b)

DTV Table of Allotments

TV Broadcast Stations

(Boynton Beach, Florida)

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)
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MM Docket No. _____

RM No. _____

To: Chief, Allocations Branch

AMENDMENT TO
PETITION FOR RULE MAKINGPAPPAS TELECASTING OF AMERICA,
A CALIFORNIA LIMITED PARTNERSHIPJohn Griffith Johnson, Jr., Esquire
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PAUL, HASTINGS, JANOFSKY & WALKER LLP
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TABLE OF CONTENTS

	<u>Page</u>
Summary	ii
Request for Waiver of the FCC's Distance Separation Requirements	5
I. The Commission Previously Has Waived the Distance Separation Requirements to Permit the Allotment of New Television Stations In An Effort to Foster the Development of New Networks	5
II. A Grant of the Requested Waiver Would Provide Substantial Public Interest Benefits Which Greatly Outweigh the Commission's Interest in Strictly Adhering to Its General Spacing Requirements	9
III. A Grant of the Requested Waiver Would Not Undermine the Commission's General Policy Regarding Short-Spaced Allotments	13
IV. The FCC Must Give This Waiver Request the Requisite "Hard Look"	18
Conclusion	18

SUMMARY

As demonstrated herein, Pappas' pending rulemaking petition requesting the allotment of NTSC Channel 15 at Boynton Beach, Florida, would cause interference to several DTV stations. Accordingly, pursuant to the Commission's *Public Notice*, DA 99-2605 (released November 22, 1999) ("Mass Media Bureau Announces Window Filing Opportunity for Certain Pending Applications and Allotment Petitions for New Analog TV Stations") ("*Window Filing Notice*"), Pappas seeks to amend its pending allotment rulemaking petition to request that the Commission amend Section 73.622(b) of the Commission's rules by allotting DTV Channel 57, rather than NTSC Channel 15, to Boynton Beach, Florida.

The proposed allotment of DTV Channel 57 at Boynton Beach is fully-spaced to all NTSC and DTV allotments with the sole exception of a vacant Channel 59 NTSC allotment at Stuart, Florida. In accordance with the *Sixth Report and Order* in MM Docket No. 87-268, *Advanced Television Systems and Their Impact Upon the Existing Broadcast Service*, 12 FCC Rcd 14588, 14639 ¶112 and n.192 (1997), the Channel 59 NTSC allotment at Stuart should be deleted. Moreover, the Channel 59 allotment at Stuart could never be implemented to provide analog service due to the Commission's authorization of a co-channel DTV station in the same community and the fact that the deadline for filing NTSC applications has long since passed.

Nevertheless, even assuming, *arguendo*, that the Commission were to require Pappas to protect the vacant Channel 59 NTSC allotment at Stuart, Florida, the Commission's general regulatory interest in strictly adhering to its spacing rules is greatly outweighed in this case by the substantial public interest benefits that would result from the proposed digital allotment at Boynton Beach. As demonstrated herein, the proposed allotment would promote the objectives of Section

307(b) of the Communications Act by providing the community of Boynton Beach with its first local television service, and serve the second television allotment priority established in the *Sixth Report and Order* of providing each community with at least one television broadcast station. More importantly, however, the proposed allotment would provide an additional competitive broadcast outlet in a top 100 television market, which would help foster the development of new national networks. At the same time, the proposed allotment would promote viewpoint diversity in the West Palm Beach-Ft. Pierce television market, increase competition in the local advertising market, and bring a new television broadcast service to 4,130,337 people in the Boynton Beach area. The proposed allotment also would serve the public interest by helping to expedite the transition from analog to digital television.

Furthermore, because the *Window Filing Notice* represents the last opportunity to amend the NTSC Table of Allotments, a grant of this waiver request would not open the floodgates to similar waiver requests in the future because there can be no further requests for waivers of the spacing rules with respect to short-spaced vacant NTSC allotments after the close of this filing window. Indeed, as the Commission determined in the *Interim Policy* and *VHF Top 100 Markets*, strict adherence to the Commission's distance separation requirements in this case would achieve a result contrary to the public interest by preventing a new and much needed television service, while a waiver of the spacing rules would not undermine the Commission's general allotment policy.

For all of these reasons, Pappas requests that the Commission amend the DTV Table of Allotments by allotting DTV Channel 57 to Boynton Beach, Florida, as that community's first local television service.

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of)	
)	
Amendment of Section 73.622(b))	MM Docket No. _____
DTV Table of Allotments)	RM No. _____
TV Broadcast Stations)	
(Boynton Beach, Florida))	

To: Chief, Allocations Branch

AMENDMENT TO
PETITION FOR RULE MAKING

Pappas Telecasting of America, A California Limited Partnership ("Pappas"), by counsel, and pursuant to Section 1.401 of the Commission's rules and *Public Notice*, DA 99-2605 (released November 22, 1999) ("Mass Media Bureau Announces Window Filing Opportunity for Certain Pending Applications and Allotment Petitions for New Analog TV Stations") ("*Window Filing Notice*"),¹ hereby amends its Petition for Rulemaking, filed July 24, 1996, requesting the allotment of NTSC Channel 15 to Boynton Beach, Florida, as that community's first local television service. Pappas amends its pending rulemaking petition to request that the Commission institute a rulemaking proceeding to amend Section 73.622(b) of the Commission's rules by allotting DTV Channel 57, rather than NTSC Channel 15 at Boynton Beach. Accordingly, Pappas proposes to amend Section 73.622(b) of the Commission's rules as follows:

¹ On March 9, 2000, the Commission extended the window filing period until July 15, 2000. See *Public Notice*, 15 FCC Rcd 4974 (2000) ("Window Filing Opportunity For Certain Pending Applications and Allotment Petitions For New Analog TV Stations Extended to July 15, 2000").

	<u>Channel No.</u>	
<u>City</u>	<u>Present</u>	<u>Proposed</u>
Boynton Beach, Florida	- - -	57

In support of this request, the following is stated:

As stated above, Pappas currently has pending a rulemaking petition requesting the allotment of NTSC Channel 15 to Boynton Beach, Florida, which would provide the community with its first local television service.² However, as demonstrated in the attached engineering statement of Pete Myrl Warren, the proposed allotment of NTSC Channel 15 at Boynton Beach would cause interference to the following DTV allotments: DTV Channel 15 at Fort Myers, Florida, DTV Channels 18, 19 and 22 at Miami, Florida, and DTV Channel 16 at Tequesta, Florida. *See* Engineering Statement, Exhibit RM-1. As a result, Pappas seeks to amend its pending rulemaking petition pursuant to the *Window Filing Notice*, and requests that the FCC amend the DTV Table of Allotments by allotting DTV Channel 57 in lieu of NTSC Channel 15 at Boynton Beach.

Pappas has searched diligently for an alternative channel/transmitter site combination for the proposed allotment at Boynton Beach that would be fully-spaced to all other NTSC and DTV stations. With the exception of a vacant Channel 59 NTSC allotment at Stuart, Florida, which will be discussed in greater detail below, Pappas was successful. As demonstrated in Mr. Warren's attached engineering statement, from the allotment reference point,³ the proposed allotment of DTV

² Pappas also filed an application for a construction permit for a new analog television station to operate on Channel 15 at Boynton Beach. The application was filed on July 24, 1996.

³ The reference coordinates for the proposed DTV allotment at Boynton Beach are North Latitude: 26° 34' 37"; West Longitude: 80° 14' 32". *See* Engineering Statement, Exhibit RM-2. These coordinates represent Pappas' proposed transmitter site, which is the authorized

(continued...)

Channel 57 at Boynton Beach is fully-spaced to all NTSC and DTV stations, and would cause less than 0.5% interference to a co-channel DTV allotment at St. Petersburg, Florida. *See* Engineering Statement, Exhibits RM-3 and FLR-1.

The proposed allotment of DTV Channel 57 to Boynton Beach would promote the objectives of Section 307(b) of the Communications Act of 1934, as amended (the "Act"), by providing the community of Boynton Beach with its first local television service. The proposed allotment would enable a new full-service digital television station to commence operation from the proposed transmitter site with 540 kilowatts omni-directional effective radiated power at an antenna height of 472 meters above average terrain without adversely affecting any other television station. Moreover, the proposed allotment would bring a new television broadcast service to 4,130,337 people in the Boynton Beach area, and would provide an 80 dBu contour to the entire community of Boynton Beach. *See* Engineering Statement, p. 1.

As indicated above, from the allotment reference point, the proposed allotment of DTV Channel 57 at Boynton Beach is short-spaced to a vacant Channel 59 NTSC allotment at Stuart, Florida. However, on April 25, 2000, the FCC granted a pending settlement proposal and issued a construction permit for a new DTV facility to operate on Channel 59 at Stuart, Florida (File No. BPCDT-19960920LH).⁴ Thus, as a result of the Commission's action, there no longer are any pending applications for the Channel 59 NTSC allotment at Stuart, Florida, and the Commission

³(...continued)
transmitter site of Station WFLX(TV), West Palm Beach, Florida. The owner of the proposed transmitter site, Malrite Communications, has indicated that the site will be made available to Pappas in the event this petition is granted and DTV Channel 57 is allotted to Boynton Beach.

⁴ *See Public Notice*, Report No. 44727 (released May 4, 2000). The call letters of the new DTV station to operate on Channel 59 at Stuart, Florida, are WHDT-TV.

cannot issue an authorization for the Channel 59 NTSC allotment at Stuart because there soon will be a digital facility operating on that channel in the same community. Furthermore, because the deadline for submitting applications for new NTSC stations has long since passed,⁵ the Commission cannot accept additional applications for the vacant Channel 59 NTSC allotment at Stuart. Therefore, in accordance with the *Sixth Report and Order* in MM Docket No. 87-268, the Commission should consider the Channel 59 NTSC allotment at Stuart, Florida, to be deleted.⁶

Nevertheless, even assuming, *arguendo*, that the Commission were to conclude that Pappas should be required to protect the vacant Channel 59 NTSC allotment at Stuart, Florida. Pappas respectfully submits that the substantial public interest benefits that would result from the proposed allotment of DTV Channel 57 at Boynton Beach greatly outweigh the Commission's general regulatory interest in strictly adhering to its distance separation requirements in this unique set of circumstances. Accordingly, Pappas hereby submits a request for waiver of the Commission's distance separation requirements.

⁵ The deadline for filing construction permit applications for new NTSC stations was September 20, 1996. See *Sixth Report and Order* in MM Docket No. 87-268, *Advanced Television Systems and Their Impact Upon the Existing Broadcast Service*, 12 FCC Rcd 14588, 14635 ¶104, n. 173 (1997).

⁶ See *Sixth Report and Order* in MM Docket No. 87-268, *Advanced Television Systems and Their Impact Upon the Existing Broadcast Service*, 12 FCC Rcd 14588, 14639 ¶112 and n.192 (1997) (Commission stated that those NTSC allotments which were not the subject of a pending application or rulemaking proceeding would be deleted). See also *Second Memorandum Opinion and Order on Reconsideration of the Fifth and Sixth Report and Orders*, 14 FCC Rcd 1438, 1466 ¶39 (1998). Thus, the Channel 59 NTSC allotment at Stuart, Florida, should be deleted.

REQUEST FOR WAIVER OF THE FCC'S DISTANCE SEPARATION REQUIREMENTS

Pappas respectfully requests that the Commission waive the minimum distance separation requirements contained in Sections 73.610, 73.698, and 73.623(c) of the Commission's rules in order to permit the proposed allotment. As demonstrated in greater detail herein, a grant of the requested waiver would promote the emergence of new national television networks by providing an additional broadcast outlet in a top 100 television market with which to establish a primary affiliation. The proposed allotment also would provide the community of Boynton Beach with its first local television service and thereby promote the objectives of Section 307(b) of the Act. In support of this waiver request, the following is stated:

I. The Commission Previously Has Waived the Distance Separation Requirements to Permit the Allotment of New Television Stations In an Effort to Foster the Development of New Networks.

In Docket No. 13340,⁷ the Commission instituted a rulemaking proceeding in an effort to find a means of alleviating the need for additional channel assignments in the larger television markets in order to foster the development of a nationwide competitive television system. The Commission concluded that the most efficient means of accomplishing its objective would be to permit, under limited circumstances, channel assignments at substandard spacings. The short-spaced allotments were authorized subject to the requirement that the new stations provide protection to the existing short-spaced stations to assure that they would not receive interference in excess of the amount they otherwise would receive from a co-channel station operating with maximum facilities at full distance separation. The Commission designated ten markets in which such a "squeeze in" procedure would

⁷ *Interim Policy on VHF Television Channel Assignments*, 21 RR 1695 (1961), *recon. denied*, 21 RR 1710a (1961) ("*Interim Policy*").

be considered. Many of these proposals, as well as those which arose out of the Commission's *Interim Policy*, involved a third commercial VHF allotment in a market that was designed to provide an additional broadcast outlet which was critical to the establishment of a third competitive network. *See, e.g., Grand Rapids, Michigan*, 21 RR 1737 (1961) (Commission assigned a second VHF channel to Grand Rapids and a third to the Grand Rapids-Kalamazoo market);⁸ *Rochester, New York*, 21 RR 1748a (1961) (FCC assigned third commercial VHF station to the community); *Syracuse, New York*, 21 RR 1754 (1961) (same).

The Commission later extended its policy of waiving its spacing provisions in appropriate circumstances to permit "move-in" applications. In *New Orleans Television Corp.*, 23 RR 1113, 1115 (1962), Station WVUA-TV, New Orleans, filed an application to move closer to its community of license to a site 30 miles short-spaced to co-channel Station WJTV, Jackson, Mississippi. Station WVUA-TV requested a waiver of the mileage separation requirements and proposed to provide equivalent protection to Station WJTV. In reviewing the application, the Commission noted that its long-standing policy of fostering the development of "at least three" competitive television networks had often been frustrated by its inability to assign a third competitive commercial VHF channel. *Id.* at 1115. The Commission also expressly acknowledged the concerns which led to the *Interim Policy*:

The problem with which the Commission grappled in Docket No. 13340 was the fostering of a nationwide competition network situation. *To accomplish this purpose it is necessary to assure the availability of competitive facilities to the networks*

⁸ In *Grand Rapids*, the Commission allotted Channel 13 to Grand Rapids, which required the substitution of Channel 9 for Channel 13 at Cadillac, Michigan, and the substitution of Channel 7 for a Channel 9 allotment at Alpena, Michigan. *Id.* at 1745. The Commission's action was designed to alleviate the "critical shortage of competitively comparable facilities in major markets" 21 RR at 1745.

within the major markets, for the economic ability of a network to survive and furnish the public with the benefits of its operation hinges ultimately on its access to competitive facilities within the major markets. By assuring the existence of a third competitive station in New Orleans, the Commission benefits not only the viewing public of that city but, ultimately, the public of the entire nation. We believe that the benefits to be derived from furtherance of this policy justify the use of Channel 12 in New Orleans at substandard spacings.

Id. at 1117 (initial emphasis added), citing *Interim Policy*, 21 RR at 1710c. As reflected above, in granting Station WUVA-TV's short-spaced application, the Commission not only provided a third competitive station in New Orleans, but the public interest benefits resulting from the grant of the short-spaced application extended to the entire country due to the Commission's effort to promote a third national network. *Id.* at 1117.

Similarly, in *Television Broadcasters, Inc.*, 4 RR 2d 119 (1965), Station KBMT(TV), Beaumont, Texas, an ABC affiliate, sought to move its transmitter approximately 34 miles north of its existing site to a location which was 18.8 miles short-spaced to co-channel Station KSIA-TV, Shreveport, Louisiana. The applicant proposed to provide equivalent protection to KSIA-TV by directionalizing its signal away from the short-spaced station, and requested a waiver of Section 73.610 of the rules. *Id.* at 121. In support of its waiver request, KBMT claimed that, from its existing transmitter site, it could not effectively compete with the local CBS and NBC affiliates which served essentially the same area, and was operating at a substantial loss.⁹ *Id.* at 121. KBMT contended that a grant of its application would enhance its competitive position as well as that of ABC vis-a-vis the other stations and networks in the market, and would provide its coverage area

⁹ The Commission found that there was a substantial disparity between the advertising rates of KBMT and the other network affiliates in the market. *Id.* at 123.

with a third competitive network television service. *Id.* at 123. In granting KBMT's application and accompanying request for waiver of Section 73.610 of the rules, the Commission stated:

While it is neither our purpose nor function to assure competitive equality in any given market, we have a duty at least to take such actions as will create greater opportunities for more effective competition among the networks in major markets.

Id. at 123, citing *Peninsula Broadcasting Corporation*, 3 RR 2d 243 (1964).¹⁰

Furthermore, in *VHF Top 100 Markets*,¹¹ the Commission granted requests for waiver of Section 73.610 to permit the allotment of new short-spaced VHF assignments to Charleston, West Virginia; Johnstown, Pennsylvania; Salt Lake City, Utah; and Knoxville, Tennessee. Each of these short-spaced allotments was subject to the condition that the new station provide equivalent protection to the existing station to which it was short-spaced. *Id.* at 234.

¹⁰ In *Peninsula Broadcasting*, the applicant alleged that a grant of its application was warranted in order to provide three competitive network services in the Norfolk, Virginia, television market. In granting the application and the accompanying short-spacing waiver request, the Commission stated:

[We have] long been concerned with the problem of making three truly competitive network services available to the public in major markets and where the opportunity is presented to achieve this objective without detriment to anyone and with benefit to many, we think . . . it is clear that a grant of the application would be warranted.

3 RR 2d at 248.

¹¹ *Petition for Rule Making to Amend Television Table of Assignments to Add New VHF Stations in the Top 100 Markets and to Assure that the New Stations Maximize Diversity of Ownership, Control and Programming*, BC Docket No. 20418, *Report and Order*, 81 FCC 2d 233 (1980) ("*VHF Top 100 Markets*"), *recon. denied*, 90 FCC 2d 160 (1982), *aff'd sub nom. Springfield Television of Utah, Inc. v. FCC*, 710 F.2d 620 (10th Cir. 1983).

In granting the petitioners' waiver requests, the Commission recognized that the four VHF drop-ins represented a significant departure from past Commission practice.¹² Nevertheless, the Commission concluded that the new VHF allotments would serve important public interest objectives such as providing new local service, the promotion of additional networks, and increased competition in advertising markets. The Commission found these to be substantial contributions to the public interest. *Id.* at 253. Moreover, on reconsideration, the Commission observed that application of the distance separation rules would achieve a result contrary to the public interest by preventing new and needed television services, and that a waiver of the rules would not undermine the policy behind them as set forth in the *Sixth Report and Order* in Docket Nos. 8736 *et al.*, *Amendment of Section 3.606 of the Commission's Rules and Regulations*, 41 FCC 148 (1952) ("*Sixth Report and Order*").

II. A Grant of the Requested Waiver Would Provide Substantial Public Interest Benefits Which Greatly Outweigh the Commission's Interest in Strictly Adhering to Its General Spacing Requirements.

The public interest benefits that would result from a grant of Pappas' amended rulemaking petition are the same public interest objectives which the Commission sought to achieve in the *Interim Policy* and *VHF Top 100 Markets*.¹³ Indeed, this amended rulemaking petition and accompanying request for waiver of the Commission's distance separation requirements would provide the same, if not greater, public interest benefits than the Commission previously found

¹² Despite the Commission's *Interim Policy*, there had been no short-spaced VHF allotments in the continental United States prior to its decision in *VHF Top 100 Markets*. 81 FCC 2d at 239.

¹³ Although this waiver request involves a proposed UHF DTV allotment, rather than a VHF analog station, the public interest objectives set forth in the *Interim Policy* and *VHF Top 100 Markets* are equally applicable to Pappas' allotment proposal.

sufficient to justify a waiver of its distance separation requirements. As stated above, the allotment of DTV Channel 57 will provide the community of Boynton Beach with its first local television service, which will promote the objectives of Section 307(b) of the Communications Act of providing a fair, efficient and equitable distribution of television broadcast stations among the various states and communities. 47 U.S.C. §307(b). See *National Broadcasting Co. v. U.S.*, 319 U.S. 190, 217 (1943) (describing goal of Communications Act to "secure the maximum benefits of radio to all the people of the United States"); *FCC v. Allentown Broadcasting Co.*, 349 U.S. 358, 359-62 (1955) (describing goal of Section 307(b) to "secure local means of expression"). In addition, the proposed allotment will promote the second television allotment priority established in the *Sixth Report and Order* of providing each community with at least one television broadcast station. 41 FCC at 167.

Even more importantly, however, Pappas' pending rulemaking petition and its accompanying application for a new analog television station in Boynton Beach, Florida, which were both filed on July 24, 1996, were part of a series of coordinated filings consisting of approximately 20 rulemaking petitions and 40 construction permit applications for new television stations, many of which propose to bring a first local television service to the specified community. The various rulemaking petitions and accompanying applications all specified communities within the top 100 television markets in which there were no full-power television stations available to affiliate with The WB Television Network ("The WB"). Each of the various petitioners/applicants (collectively, "Petitioners") who comprised this coordinated filing effort then had affiliation agreements with The WB for some or all of their existing television stations. The WB indicated a willingness to enter into further

affiliation agreements with the Petitioners in the event they were ultimately successful in obtaining a license for their proposed stations.¹⁴

As the Commission is well aware, almost two-thirds of all television markets have only four commercial stations. As a result, it is extremely difficult for any new network, including The WB, the United Paramount Network ("UPN"), or Paxson Network ("Paxnet") to find affiliates in the major markets. The WB generally has been the fifth, and often the sixth, network to enter those top 100 markets in which it has an affiliate. Indeed, The WB has explained to the Commission in a variety of proceedings that its primary challenge in establishing itself as a nationwide network has been finding a sufficient number of stations with which to affiliate.¹⁵ Thus, a grant of this waiver request and the allotment of DTV Channel 57 to Boynton Beach -- in conjunction with grants of the other pending rulemaking petitions and applications which comprise this larger overall proposal -- would provide much needed assistance in fostering the development of new national networks by helping to alleviate the critical need for additional broadcast outlets. Specifically, a grant of this waiver request would permit the allotment of a new television station in a top 100 market with which

¹⁴ Pappas is inclined to enter into an affiliation agreement with The WB in the event DTV Channel 57 is allotted to Boynton Beach and it is successful in obtaining a construction permit for the proposed new DTV station.

¹⁵ See, e.g., Comments of The WB Television Network, *Establishment of a Class A Television Service*, MM Docket No. 00-10 (filed Feb. 10, 2000); Comments and Reply Comments of The Warner Bros. Television Network, *Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Network and Affiliates*, MM Docket No. 95-92 (filed Oct. 30, 1995, Nov. 27, 1995); Reply Comments of The Warner Bros. Television Network, *Reexamination of The Policy Statement in Comparative Broadcast Hearings*, GC Docket No. 92-52 (filed Aug. 22, 1994). UPN has expressed similar difficulties in attempting to establish a nationwide presence. See Comments of the UPN, *Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Network and Affiliates*, MM Docket No. 95-92 at 21-22 (filed Oct. 30, 1995).

The WB (or another emerging network) could affiliate, and thereby make progress towards achieving national penetration and a competitive stronghold with the established networks. Although there is no guarantee that Pappas will ultimately acquire the construction permit for the proposed new television station at Boynton Beach or that the station will affiliate with The WB, the salient fact is that the allotment of DTV Channel 57 to Boynton Beach would provide an additional broadcast outlet for all of the new networks to have the opportunity to gain an affiliation and thereby strengthen their effort to obtain a nationwide audience.

Pappas recognizes that there currently are few DTV receivers, and that the proposed new digital station in Boynton Beach initially may have a rather limited over-the-air audience. Nevertheless, Pappas believes that the proposed new DTV station will be able to obtain carriage of its digital signal over the local cable systems, which would make the station's programming available to all of the subscribers served by such cable systems. Pappas also believes that the commencement of a new DTV service at Boynton Beach would provide a substantial public interest benefit by helping to expedite the transition from analog to digital service.¹⁶ Indeed, the Commission has recognized that the cable carriage of a DTV station's ancillary and supplementary digital services may spur consumers to purchase digital receivers.¹⁷

¹⁶ See, e.g., *Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order* in MM Docket No. 87-268, *Advanced Television Systems and Their Impact Upon the Existing Broadcast Service*, 13 FCC Rcd 7418, 7479 (1998) (Commission stated that its goal was to "provide for the transition to DTV service so that the benefits of this new technology can be brought to the American people in an expeditious and efficient manner").

¹⁷ See *Carriage of the Transmissions of Digital Television Broadcast Stations; Amendment of Part 76 of the Commission's Rules*, 13 FCC Rcd 15092, 15111 (1998) (Notice of Proposed Rule Making).

As demonstrated above, this rulemaking petition and accompanying waiver request provide another opportunity for the Commission to fulfill the public interest objectives articulated in the *Interim Policy* and *VHF Top 100 Markets*. By granting a rather limited waiver of the minimum distance separation requirements and allotting DTV Channel 57 to Boynton Beach, the Commission can provide an additional broadcast outlet in a top 100 television market,¹⁸ and thereby foster the development of a new national network. In addition, the allotment of DTV Channel 57 to Boynton Beach would provide the community with its first local television service, promote viewpoint diversity in the West Palm Beach-Ft. Pierce television market, increase competition in the local advertising market, and bring a new television service to 4,130,337 people in the Boynton Beach area. Indeed, in light of the Commission's relaxation of the local television ownership rule and the ever increasing consolidation in the broadcast industry, the substantial public interest benefits that would result from this allotment proposal have even more significance today than those that existed at the time the *Interim Policy* and *VHF Top 100 Markets* were adopted.

III. A Grant of the Requested Waiver Would Not Undermine the Commission's General Policy Regarding Short-Spaced Allotments.

The full Commission articulated its policy regarding short-spaced allotments in *Pueblo, Colorado*, 16 Comm. Reg. (P&F) 610 (1999) (*Memorandum Opinion and Order on Remand*):

[B]y maintaining strict adherence to a fully-spaced allotment scheme, we preserve the capacity to permit necessary adjustments to spacing where the construction of actual facilities so requires, while minimizing potential adverse interference effects from such adjustments. This is because, when a party files a petition for rulemaking to amend the Table of Allotments, a hypothetical set of reference coordinates are used for purposes of making the allotment. The petitioner is not required to specify an actual transmitter site where the station will be operated, only a theoretical fully-

¹⁸ The West Palm Beach-Ft. Pierce market currently is the 43rd television market. See *Broadcasting & Cable*, p. 245 (2000).

spaced transmitter site location. At this point, the Commission disfavors making a short-spaced allotment because it does not want to begin the process with a substandard allotment. In order to protect the integrity of the Table, the Commission demands that the process of creating a new station begin with an allotment that is not already short-spaced. However, later, when a party files an application to construct its actual transmitter site, and the Commission examines the actual facilities that will be constructed to operate the station, it may be determined that no fully-spaced transmitter sites are available. At that later point in the process, the Commission may allow a deviation of its spacing rules when it is demonstrated that the public interest benefits are great enough to support a waiver.

Consistent with that approach, we have only permitted short-spaced allotments where the petitioner has demonstrated a “compelling need for departure from the established interstation separation standards.”

Id. at 616, ¶¶23-24 (citations omitted). The full Commission has also stated that “[s]trict adherence to the spacing requirements set forth in the Table of Allotments is necessary . . . in order to provide a consistent, reliable and efficient scheme of [allotments].” *Chester and Wedgefield, South Carolina*, 5 FCC Rcd 5572 (1990).

Pappas respectfully submits that the substantial public interest benefits that would result from the proposed allotment of DTV Channel 57 to Boynton Beach more than satisfy the Commission’s “compelling need” standard. However, even assuming, *arguendo*, that the Commission were to conclude that the significant public interest objectives articulated in the *Interim Policy* and *VHF Top 100 Markets* -- which would be promoted by a grant of Pappas’ petition -- are insufficient to warrant the proposed short-spaced allotment, the Commission’s general policy regarding short-spaced allotments should not be applied in this case. Indeed, the public interest benefits that would result from the proposed allotment substantially outweigh the Commission’s general regulatory interest in protecting the “integrity of the Table of Allotments,” especially considering that the proposed DTV allotment would be short-spaced only to a vacant NTSC allotment, upon which analog service

can never be implemented due to a co-channel DTV facility in the same community and the fact that the deadline for submitting applications for new NTSC stations has long since passed.¹⁹

As reflected in the Commission's *Memorandum Opinion and Order on Remand in Pueblo, Colorado*, by requiring that a proposed allotment be fully-spaced at the outset, the Commission's general allotment policy is designed to "minimiz[e] potential adverse interference effects" that may result from "necessary adjustments" in the event no fully-spaced transmitter sites are available at the application stage. However, contrary to the Commission's general statement in *Pueblo, Colorado*, the proposed allotment reference point in this case does not represent a "hypothetical set of reference coordinates," but, instead, represents an existing communications site where Pappas intends to locate its transmitter.²⁰ The owner of the existing tower structure, Malrite Communications, has provided reasonable assurance that the site will be made available in the event this petition is granted and DTV Channel 57 is allotted to Boynton Beach. Thus, although the proposed allotment reference point has not yet been specified in a construction permit application for the DTV Channel 57 facility at Boynton Beach, the allotment reference point is an available transmitter site.²¹ Therefore, Pappas

¹⁹ The deadline for filing construction permit applications for new NTSC stations was September 20, 1996. See *Sixth Report and Order* in MM Docket No. 87-268, *Advanced Television Systems and Their Impact Upon the Existing Broadcast Service*, 12 FCC Rcd 14588, 14635 ¶104, n. 173 (1997).

²⁰ Pappas' proposed site is the licensed transmitter site of Station WFLX(TV), West Palm Beach, Florida.

²¹ In a related context, the Commission has not hesitated to allot a new channel based upon the reference coordinates of a petitioner's proposed transmitter site. For example, in *Virginia Beach, Virginia*, 11 FCC Rcd 4715 (Allocations Branch 1996), the Commission allotted a new television channel to Virginia Beach even though the center city coordinates of the community of license were within the "freeze zone" established by the ATV freeze. See *Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*,

(continued...)

requests that the Commission allot DTV Channel 57 to Boynton Beach with an appropriate site restriction to ensure that the proposed DTV allotment is short-spaced only to the vacant Channel 59 NTSC allotment at Stuart, Florida, and that the proposed new DTV station would not cause prohibited interference to any NTSC or DTV station.

Furthermore, Pappas respectfully submits that the Commission's interest in maintaining the "integrity of the Table of Allotments" and providing "a consistent, reliable and efficient" allotment scheme should be given diminished consideration with respect to the rulemaking petitions and amended petitions filed in response to the *Window Filing Notice* because this is the last opportunity to amend the NTSC Table of Allotments. The deadline for filing allotment rulemaking petitions for new NTSC stations expired on July 25, 1996.²² Upon the close of this window filing period on July 17, 2000, there will be no further opportunity to amend the NTSC Table of Allotments. Therefore, because the allotment proposals filed during this window which are short-spaced to vacant NTSC allotments are the last such rulemaking petitions that will ever be filed with the Commission, a waiver of the Commission's distance separation requirements pursuant to the policy objectives set forth in the *Interim Policy* and *VHF Top 100 Markets* would not open the floodgates to similar short-spacing waiver requests in the future. As in *VHF Top 100 Markets*, the *Window Filing Notice* provides a limited filing opportunity during which there can be only a small, finite number of short-

²¹(...continued)

RM-5811, 1987 FCC LEXIS 3477 (July 17, 1987), 52 Fed.Reg. 28346 (1987). *See also* *Wittenberg, Wisconsin*, 11 FCC Rcd 12231 (Allocations Branch 1996) (same).

²² *See Sixth Report and Order* in MM Docket No. 87-268, *Advanced Television Systems and Their Impact Upon the Existing Broadcast Service*, 12 FCC Rcd 14588, 14635-36 (1997).

spaced allotment proposals that would provide sufficient public interest benefits to warrant a waiver of the spacing rules.

Further, due to the relatively short time period before the end of the NTSC/DTV transition period, which is scheduled to occur at the end of 2006, the short-spacing that would result from the proposed DTV Channel 57 facility at Boynton Beach is essentially an interim proposal. At the end of the transition period, when television stations are required to return one of their paired channels, the proposed Boynton Beach DTV station will be able to move to a fully-spaced digital allotment inside the core. In light of the substantial likelihood that: (i) the Commission will not grant this amended petition before the fourth quarter of 2000; (ii) the Commission will not hold an auction for competing applications for the new Boynton Beach DTV station before the third quarter of 2001; (iii) a construction permit for the new Boynton Beach station will not be issued before the first quarter of 2002; and (iv) it will take Pappas or any other permittee at least one year to complete construction of the new DTV station; the proposed new Boynton Beach DTV station is not likely to commence operation until sometime in 2003. Assuming that the transition period ends as scheduled, this would mean that the proposed Boynton Beach DTV station would be short-spaced to the vacant Channel 59 NTSC allotment at Stuart, Florida, for a period of less than four years before moving to a fully-spaced digital allotment inside the core.

Many industry observers believe, however, that although the DTV transition period is scheduled to end in 2006, due to the market penetration requirement contained in Section 309(j) of the Act, 47 U.S.C. §309(j)(14)(B), the transition deadline is likely to be extended.²³ Assuming,

²³ See, e.g., *Completing the Transition to Digital Television*, Congressional Budget Office, Congress of the United States (Sept. 1999).

arguendo, that the transition deadline were to be extended by several years, the substantial public interest benefits that would result from having the proposed Boynton Beach DTV station commence operation prior to the end of the transition period greatly outweigh the Commission's general policy of "protecting the integrity of the Table of Allotments" in this rare set of circumstances where the proposed DTV allotment is short-spaced only to a vacant NTSC allotment upon which analog service can never be implemented due to (i) a co-channel DTV station in the same community, and (ii) the fact that licensing of analog television stations has come to an end.²⁴

IV. The FCC Must Give This Waiver Request the Requisite "Hard Look."

It is well established that the Commission is "required to give waiver requests a 'hard look' and may not treat well-pleaded waiver requests in a perfunctory manner." *VHF Top 100 Markets*, 90 FCC 2d 160, 166 (1982) (reconsideration order), citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). Indeed, as the D.C. Circuit has made clear:

. . . [A] general rule, deemed valid because its overall objectives are in the public interest, may not be in the "public interest" if extended to an applicant who proposes a new service that will not undermine the policy, served by the rule, that has been adjudged in the public interest.

WAIT Radio, 418 F.2d at 1157. Therefore, in considering this waiver request, Pappas respectfully submits that the Commission should look beyond its general policy regarding short-spaced allotments, and determine whether the rationale underlying that policy would be undermined in light of the substantial and broad-reaching public interest benefits that would result from a waiver of its spacing rules, especially considering the unique and extremely limited context in which this waiver request has been presented.

²⁴ See *Sixth Report and Order* in MM Docket No. 87-268, 12 FCC Rcd at 14639 ¶12.

CONCLUSION

As demonstrated above, a grant of this amended petition and the accompanying waiver request would provide substantial public interest benefits by providing an additional competitive broadcast outlet in a top 100 television market, which would help foster the development of new national networks. At the same time, the proposed allotment would provide the community of Boynton Beach with its first local television service, which would promote the objectives of Section 307(b) of the Act and the second television allotment priority established in the *Sixth Report and Order*. Moreover, because the proposed DTV allotment is short-spaced only a vacant NTSC allotment upon which analog service can never be implemented, the proposed new DTV station at Boynton Beach would not cause prohibited interference to any NTSC or DTV station. Furthermore, because this is the last opportunity to amend the NTSC Table of Allotments, a grant of this waiver request would not open the floodgates to similar short-spacing waiver requests in the future because there can be no further requests for waivers of the spacing rules with respect to short-spaced vacant analog allotments after the close of this filing window. Indeed, as the Commission determined in the *Interim Policy* and *VHF Top 100 Markets*, strict adherence to the Commission's distance separation requirements in this case would achieve a result contrary to the public interest by preventing a new and much needed television service, while a waiver of the spacing rules would not undermine the Commission's general allotment policy.

For all of these reasons, Pappas requests that the Commission amend the DTV Table of Allotments by allotting DTV Channel 57 to Boynton Beach, Florida, as the community's first local television service. In the event DTV Channel 57 is allotted to Boynton Beach, Pappas will amend

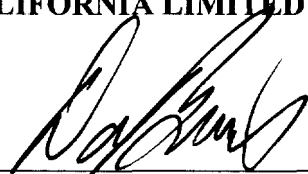
its pending application (or submit a new application) in accordance with the Report and Order issued in this proceeding to specify the new DTV channel, and modify its technical proposal as necessary so that the proposed Channel 57 DTV facility will not cause harmful interference to any other television station. In the event its application is ultimately granted, Pappas will promptly construct and operate the new digital facility.

WHEREFORE, in light of the foregoing, Pappas Telecasting of America, A California Limited Partnership, respectfully requests that the Commission GRANT this amended petition for rulemaking, AMEND the DTV Table of Allotments, and ALLOT DTV Channel 57 to Boynton Beach, Florida, as the community's first local television service.

Respectfully submitted,

**PAPPAS TELECASTING OF AMERICA,
A CALIFORNIA LIMITED PARTNERSHIP**

By: _____



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July 17, 2000

WES, INC.
6200 Valeria Ln.
El Paso, TX 79912

505-589-2224

**ENGINEERING EXHIBIT
PETITION TO MODIFY THE TABLE OF
ALLOTMENTS TO SPECIFY A
DISPLACEMENT CHANNEL TO
SUBSTITUTE FOR BOYNTON BEACH, FL
CHANNEL 15**

June 23, 2000

ENGINEERING STATEMENT

Wes, Inc.

DECLARATION

I, Pete E Myrl Warren, III, declare and state that I am a Certified Broadcast Engineer, by the National Association of Radio and Television Engineers, and my qualifications are a matter of record with the Federal Communications Commission, and that I am an engineer in the firm of Wes, Inc., and that the firm has been retained to prepare an engineering statement on behalf of Pappas Telecasting of America.

All facts contained herein are true to my knowledge except where stated to be on information or belief, and as to those facts, I believe them to be true. All Exhibits were prepared by me or under my supervision. I declare under penalty of perjury that the foregoing is true and correct.



Pete E Myrl Warren, III

Executed on the 23rd day of June 2000

Narrative Statement

I. GENERAL

This engineering report has been prepared on behalf of Pappas Telecasting of America, in support of its request for a displacement channel (Digital Channel 57) for its pending application for Channel 15 in Boynton Beach, FL.

II. ENGINEERING DISCUSSION

The applicant originally applied for a construction permit for channel 15 in Boynton Beach, FL. The applicant is precluded from going on channel 15 due to interference to several short-spaced digital allotments as outlined in Exhibit RM-1

The applicant proposes the allocation site at the same site as its previous application:

North Latitude: 26° 34' 37"

West Longitude: 80° 14' 32"

It is proposed to amend Section 73.622(b) of the Commission's rules, Digital Table of Allotments, to allot Channel 57 (728-734 MHz) for the digital television operation at Boynton Beach, FL. As demonstrated below, the proposed Channel 57 DTV operation at Boynton Beach, FL **would not cause any harmful interference to any other analog NTSC or DTV station or allotments exceeding the Commission's guidelines.**

The proposed DTV Channel 57 has site availability and can operate from the proposed antenna site with 540 kW omni-directional ERP and 472 meters HAAT without adversely impacting other TV operations. The proposed Channel 57 would serve all of Boynton Beach, FL within its DTV coverage contour. Boynton Beach, FL Channel 57 would provide additional service to a population of 4,130,337 people.

Analog NTSC TV Allocation Situation

The attached Exhibit RM-2 demonstrates that Channel 57, Boynton Beach **is free of all short-spacings to NTSC since the Stuart, Florida, Channel 59 has converted to DTV.**

Class A Situation

This rulemaking is clear of all Class A interference requirements.

DTV Allocation Situation

The attached Exhibit RM-3 lists all digital allotments that must be considered within 429 kilometers of the proposed rule-making. The applicant is sufficiently spaced from St. Petersburg, Florida, as outlined in Section 73.623(d)(2) of the Commission's rules. The attached exhibit FLR-1 demonstrates what interference St. Petersburg, Florida DTV 57 receives at present and with the addition of Boynton Beach, Channel 57 as specified in this rule-making. The interference accepted by St. Petersburg, Florida, DTV Channel 57 is less than 0.5% and is therefore considered negligible and acceptable.

III. Summary

The applicant must change channel from Channel 15 in Boynton Beach, Florida, to digital channel 57 in order to avoid interference to digital television. On digital channel 57, Boynton Beach will not cause any interference to any NTSC stations and less than 0.5% interference to any Digital stations.

**Exhibit RM-1
Boynton Beach, FL**

**June 23, 2000
by WES, Inc. Broadcast Consultants**

Spacing study to Digital TV on Boynton Beach's current channel 15

Study Location:
Boynton Beach, FL Channel 15

NTSC Study Station, Transmitter Coordinates: 26-34-37 N 80-14-32 W

Study distance: 429 km

*****NTSC TO DTV STUDY RESULTS*****

City of License	ST	Chan	Bearing	Distance	Req. Dist	Diff.
Fort Myers	FL	15	280.25	153.92	244.60	-90.68
Miami	FL	18	177.50	68.60	96.60	-28.00
Miami	FL	19	178.30	67.43	96.60	-29.17
Miami	FL	22	178.30	67.43	96.60	-29.17
Miami	FL	30	191.16	117.09	96.60	20.49
Tequesta	FL	16	345.90	62.20	88.50	-26.30

Station is short-spaced to 5 stations.

Exhibit RM-2
Boynton Beach, FL

June 23, 2000
by WES, Inc. Broadcast Consultants

Spacing study to NTSC TV on Digital Channel 57

***** TV CHANNEL SPACING STUDY *****

Job title: Boynton Beach, FL
Channel: 57
Database file name: tv000117.edx

Latitude: 26 34 37
Longitude: 80 14 32

CH	Call	Record No.	City	ST	Z	STS	Bear.	Dist.	Reqd. Dist.	Result
42+	WXELTV	2329	WEST PALM BEACH	FL	3	L	.0	.0	<24.1	24.1
61o	WFGC	2338	PALM BEACH	FL	3	C	10.1	20.9	<24.1	3.2

***** End of channel 57 study *****

**Exhibit RM-3
Boynton Beach, FL**

June 23, 2000

by WES, Inc. Broadcast Consultants

Spacing study to Digital TV on channel 57

Study Location:

Boynton Beach, FL Channel 57

DTV Study Station, Transmitter Coordinates: 26-34-37 N 80-14-32 W

Study distance: 429 km

DTV TO DTV STUDY RESULTS

City of License	ST	Chan	Bearing	Distance	Req. Dist	Diff.
St. Petersburg	FL	57	305.01	244.39	223.70	20.69

Station is in the clear!

Exhibit FLR-1
Boynton Beach, FL
March 10, 2000

Fortran Longley-Rice Interference Study
by WES, Inc. Broadcast Consultants

Study not including Boynton Beach, Florida DTV 57:

Run begins Fri Mar 10 16:02:10 2000, host providence

Analysis of: 57A FL ST. PETERSBURG

HAAT 438.0 m, ATV ERP 1000.0 kW

	POPULATION	AREA (sq km)
within Noise Limited Contour	3378848	35307.5
not affected by terrain losses	3378704	35303.5
lost to NTSC IX	46	8.0
lost to additional IX by ATV	126507	867.9
lost to ATV IX only	126507	867.9
lost to all IX	126553	875.9

Finished Fri Mar 10 16:06:58; run time 0:03:48

15356 calls to Longley-Rice; path distance increment 1.00 km

Study with Boynton Beach, FL DTV 57 added at 540 kW omni at 472m HAAT:

Run begins Fri Mar 10 16:24:10 2000, host providence

Analysis of: 57A FL ST. PETERSBURG

HAAT 438.0 m, ATV ERP 1000.0 kW

	POPULATION	AREA (sq km)
within Noise Limited Contour	3378848	35307.5
not affected by terrain losses	3378704	35303.5
lost to NTSC IX	46	8.0
lost to additional IX by ATV	126908	919.9
lost to ATV IX only	126908	919.9
lost to all IX	126954	927.9

Finished Fri Mar 10 16:32:08; run time 0:06:10

22131 calls to Longley-Rice; path distance increment 1.00 km

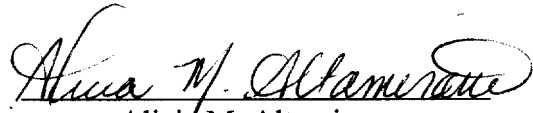
CERTIFICATE OF SERVICE

I, Alicia M. Altamirano, a secretary in the law firm of Paul, Hastings, Janofsky & Walker LLP, hereby certify that on this 17th day of July, 2000, I caused copies of the foregoing **AMENDMENT TO PETITION FOR RULE MAKING** to be hand delivered or mailed first-class, postage prepaid, to the following:

Mr. Roy J. Stewart*
Chief, Mass Media Bureau
Federal Communications Commission
The Portals II
445 12th Street, S.W.
Room 2-C347
Washington, D.C. 20554

Mr. Keith Larson*
Assistant Chief, Engineering
Mass Media Bureau
Federal Communications Commission
The Portals II
445 12th Street, S.W.
Room 2-C420
Washington, D.C. 20554

Guenter Marksteiner
2835 S.W. Brighton Way
Palm City, Florida 34990
(Permittee of Station WHDT-TV,
Channel 59, Stuart, Florida)


Alicia M. Altamirano

*Hand Delivered